

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

UNITED STATES OF AMERICA)	
)	
)	
Plaintiff,)	
)	
vs.)	No. C 21-8735 WHA
)	
UBER TECHNOLOGIES, INC.)	
)	San Francisco, California
Defendant.)	Wednesday
)	April 13, 2022
)	1:30 p.m.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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1 WEDNESDAY - APRIL 13, 2022

1:28 P.M.

2 P R O C E E D I N G S

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4 **THE CLERK:** Now calling Civil Matter 21-8735. United
5 States of America versus Uber Technologies, Inc.

6 Will counsel please state your appearances for the record,
7 starting with the plaintiff.

8 **MR. FAIELLA:** Hello. I'm Matthew Faiella for the
9 United States. I'm joined -- would you like me to introduce my
10 colleagues?

11 **THE COURT:** Yes, please.

12 **MR. FAIELLA:** I'm joined by David DeVito also for the
13 United States, and David Knight, and a paralegal from the
14 Department of Justice as well, Kashia Adams.

15 **THE COURT:** Welcome to all of you.

16 And?

17 **MR. SCHOENFELD:** Good afternoon, Your Honor. Alan
18 Schoenfeld from Wilmer Hale for Uber. I'm joined by Morgan
19 Jackson from Uber.

20 **THE COURT:** All right. Thank you. Welcome to all of
21 you.

22 Okay. This is a Motion to Dismiss, but before we get to
23 the Motion to Dismiss, I wanted to understand the Complaint
24 better.

25 What exact fee are you challenging here? You just say

1 fee, but then you say "fees" plural, and it's -- almost just
2 struck this as an indefinite. Are you challenging any fee or
3 fees?

4 **MR. FAIELLA:** Yes, Your Honor. We are challenging
5 Uber's, what it calls a wait time fee policy or program under
6 which they charge individuals who need more than two minutes
7 before the ride begins after the system, the Uber system,
8 determines that the vehicle has arrived at the pickup location.

9 **THE COURT:** All right. So you're not challenging
10 stow fees?

11 **MR. FAIELLA:** No, we are not.

12 **THE COURT:** All right. It's only late fee, late fee?

13 **MR. FAIELLA:** Yes, Your Honor. These fees, we argue,
14 are actually charging individuals with disabilities for the
15 boarding time that they need, which is something that's
16 protected by the ADA.

17 So the way that we understand the program to work at this
18 point is that after the app determines that the Uber car has
19 arrived at a pickup location, if the car hasn't left the pickup
20 location and started the trip within two minutes, that the
21 passenger is charged a fee after that point. It seems to be
22 permanent.

23 **THE COURT:** Now, does that fee -- is it a one-time
24 fee or does it -- if after another two minutes does it double?
25 How does the fee work?

1 **MR. FAIELLA:** Sure --

2 **THE COURT:** Your Complaint doesn't say. Your
3 Complaint doesn't say how the fee works.

4 **MR. FAIELLA:** Yes, Your Honor. We're not certain
5 exactly how it works from, you know, the same way Uber would
6 understand it. But what our understanding is right now is that
7 it's a permanent fee.

8 So each minute that the car is at the pickup location,
9 after the two-minute mark, before the car law office the pickup
10 location, the user is charged a fee for each of those minutes.

11 **THE COURT:** Okay. You can have a seat. That helps
12 me understand better.

13 All right. Let's hear from Wilmer.

14 Now, you have gone way outside the pleadings. How can I
15 possibly grant this motion, which you don't -- you try to tell
16 me how your fee works and it's all outside the pleadings. So
17 I'm disturbed by that.

18 Let me give you an example. Let's say that the guy in the
19 wheelchair is right there on the corner, but the Uber driver
20 parks across the street, which happens all the time, and they
21 stop. Now, the -- the GPS, which is only accurate to about
22 half a block at best, sometimes in the city not that much, but
23 is going to start the two-minute thing, and it could be that
24 the guy can't even cross the crosswalk in two minutes to get
25 over to the other side to get in the car and, yet, you're going

1 to hit him with a late fee.

2 Now, that's -- none of that's in the Complaint, but your
3 motion goes way outside the Complaint.

4 So explain to me how -- just in that one situation that I
5 gave you, how would it work.

6 **MR. SCHOENFELD:** So I think, Your Honor, you've
7 described it correctly.

8 There is -- once the car arrives as the GPS has
9 determined, if the driver waits for more than two minutes for
10 whatever reason, for reasons having to do with a rider's
11 disability or not, the wait time fee begins to accrue at two
12 minutes, and it's a permanent fee.

13 So regardless of the reason for which the rider is
14 delayed, and it could be that they are in their house and it
15 takes longer for them to get down or they are at the location
16 that they have designated and it takes them longer to get into
17 the vehicle, under those circumstances a permanent wait time
18 charge will be assessed.

19 **THE COURT:** But don't you think it's unfair in the
20 case I gave you? Somebody is in a wheelchair and they are
21 trying to get across a street because your driver decided to
22 park over on the other side and they get hit with a late fee?
23 To me, that's not fair.

24 **MR. SCHOENFELD:** I understand Your Honor's point.
25 I think the question here, obviously, is whether it's

1 impermissible under the ADA. And I think what the regulations
2 that we've cited and the regulations the Government relies
3 on --

4 **THE COURT:** You don't have a regulation on point.
5 You have stow fees. This is not a stow fee. So you don't have
6 any regulation exactly on point. And none of the regulation
7 says anything about GPS and the vagaries of GPS, which we ought
8 to get discovery into.

9 We ought to bust this case wide open, get depositions
10 going, documents, so we can understand how it actually works,
11 as opposed to you to trying to say that it works exactly like
12 regulations that are not even on point.

13 **MR. SCHOENFELD:** So the stowage fee is just an
14 illustrative example that the Department of Transportation has
15 given, but I do think the regulation --

16 **THE COURT:** What is your closest regulation?

17 **MR. SCHOENFELD:** It's 49 C.F.R. 37.5.

18 **THE COURT:** I want my Law Clerk to give me the C.F.R.
19 Do we have the C.F.R., the book? Do any of you lawyers have
20 it?

21 **MR. SCHOENFELD:** I have the text printed out. It's
22 highlighted --

23 **THE COURT:** That's the best I can do I guess.

24 (Brief pause.)

25 **MR. SCHOENFELD:** I hope you'll forgive my

1 highlighting.

2 **THE COURT:** Hand it up. Hand it up to me.

3 (Whereupon document was tendered to the Court.)

4 **THE COURT:** And thank you.

5 All right. So small that print. Okay.

6 **MR. SCHOENFELD:** Sorry.

7 **THE COURT:** Go ahead.

8 **MR. SCHOENFELD:** Sure.

9 **THE COURT:** So it's 49 C.F.R. 37.5(d) ., and it says:

10 "An entity shall not impose special charges not
11 authorized by this part on individuals with
12 disabilities, including individuals who use
13 wheelchairs, for providing services required by this
14 part or otherwise necessary to accommodate them."

15 And that's the regulation that the Government proceeds
16 under. There are other regulations they proceed under as well.
17 But what this regulation says is that what's forbidden is not
18 charges, but instead it's special charges or what other
19 provisions call higher charges and surcharges.

20 **THE COURT:** Let's say your late fee was ten seconds
21 and that 99 percent of everybody or 90 percent could do it in
22 ten seconds, but the disabled would almost never be able to do
23 it in ten seconds.

24 Wouldn't that have an unequal burden on -- on those people
25 in wheelchairs?

1 **MR. SCHOENFELD:** I don't think so. I think the point
2 of this regulation, and the commentary that I point Your Honor
3 to, commentary on 37.5(d) speaks directly to what this means.
4 It says:

5 "The prohibition on special charges applies to
6 charges for service to individuals with disabilities
7 that are higher than charges for the same or
8 comparable services to other persons."

9 The reason the stowage fee example is important here is
10 because it defeats the Government's theory that if a person
11 with a disability needs a particular accommodation, in all
12 cases it's impermissible to charge them a fee.

13 The stowage fee example says: If you charge a generally
14 applicable fee -- let me know if I'm going too fast.

15 If you charge a generally applicable fee, you can charge a
16 dollar for a wheelchair just as you charge a dollar for a
17 suitcase. That means a person in a wheelchair will always pay
18 a dollar more to use a transportation service. They have to
19 use their wheelchair. They have to pay their dollar fee in
20 order to use the vehicle. And any other person can make the
21 choice about whether to stow luggage or not.

22 And DOT specifically says, speaking to that illustration,
23 that is not a surcharge and there is no obligation to waive the
24 fee. There is --

25 **THE COURT:** But that -- but the stow fee, they are

1 not challenging that. They are challenging late fees.

2 **MR. SCHOENFELD:** I understand, Your Honor. But I
3 think the logic applies with equal force here. Again, the
4 language of the regulation and DOT's general interpretation of
5 the regulation.

6 The stowage fee isn't -- isn't part of the regulation.
7 It's an illustrative example. What matters is the regulatory
8 language. I agree with Your Honor that point.

9 What the regulatory language says is if you charge a
10 generally applicable fee, it is not an impermissible surcharge
11 or higher charge or special charge. And here this fee applies
12 to everyone under all circumstances.

13 And as the Government acknowledges at Page 10 of their
14 opposition, the fee will be assessed against a person with a
15 disability if that person with a disability is late for reasons
16 having nothing to do with their disability.

17 So there are lots of circumstances where this wait time
18 fee applies that have nothing to do with a delay caused by the
19 disability, which is what the Government, I think, acknowledges
20 in their opposition is the only circumstance under which the
21 late fee is impermissible under the statute.

22 But the regulations make clear, 37.5 and then 37.29, that
23 these sorts of fees that are generally applied don't
24 discriminate within the meaning of the statute.

25 The -- the additional guidance that I would just point

1 Your Honor to is the DOJ guidance, which I think speaks to this
2 as well, which is also speaking to this notion of surcharge or
3 special charge or higher charge. And what DOJ has said in its
4 authoritative interpretation is that when a professional bills
5 on the basis of time, it's not impermissible for him to charge
6 more on account of delays that are occasioned by a disabled
7 person's disability.

8 DOJ spoke to that in the context of their surcharge
9 regulation, which is trying to accomplish the same goal here,
10 which is to make sure that people with disabilities aren't
11 charged more for the accommodations that the law requires to be
12 provided to them, but just that they are treated equally even
13 if the incidents of the fee falls in a way that is unavoidable
14 by the person with a disability.

15 **THE COURT:** Okay. Hold that thought.

16 Let's hear from the Government on that. What is your best
17 authority --

18 **MR. SCHOENFELD:** Do you want me to sit down?

19 **THE COURT:** Please. I'm going to give you a chance
20 to respond. But the other side points to regulations that seem
21 to say it's okay to -- you know, you don't have a -- you can't
22 have a special charge for a disability, but you can -- so why
23 isn't this -- there is no special charge they say, so they are
24 innocent.

25 So what is your best regulation or your best decision that

1 says they are not innocent?

2 **MR. FAIELLA:** Yes, Your Honor. I think a helpful
3 case is from the Ninth Circuit in the *McGary versus City of*
4 *Portland* decision where the Ninth Circuit deemed violative of
5 the ADA a nuisance fee that was imposed on a person who had a
6 disability who needed --

7 **THE COURT:** What kind of fee?

8 **MR. FAIELLA:** A nuisance fee or a fine.

9 **THE COURT:** Nuisance?

10 **MR. FAIELLA:** Yes. Because the individual's front
11 yard wasn't clean enough, and the person needed more time to
12 clean their yard because of their disability.

13 And similarly here, we have individuals with disabilities
14 who need more time to complete boarding a vehicle.

15 **THE COURT:** Okay. Go back to the -- tell me the
16 facts. How much time was allowed and how much time did the
17 occupant say they needed. Give me the facts of the case a
18 little bit better.

19 **MR. FAIELLA:** Sure, Your Honor. It will take me just
20 one second.

21 **THE COURT:** It has nothing to do with transportation,
22 by the way.

23 **MR. FAIELLA:** Yeah. It was an individual with --
24 whose disability included having -- living with Aids and was
25 actually hospitalized for a period during which the city had

1 decided that he would be fined if he weren't to complete the
2 clean-up of his yard. I don't know exactly off the top of my
3 head how long that was. I believe it was at least a matter of
4 weeks, and he was asking for extensions in excess of months.

5 And there the Ninth Circuit, you know, recognized that the
6 city's policy was being evenhandedly applied in a neutral
7 manner to individuals with and without disabilities, but the
8 ADA calls for entities to reasonably modify their policies when
9 their policies result in extra fees or discrimination being
10 perpetrated against people with disabilities.

11 So here Mr. McGary was not allowed to be charged under the
12 ADA for this essentially late fee because he needed more time
13 to --

14 **THE COURT:** Well, did the decision actually go that
15 far?

16 What my Law Clerk just handed me in that decision said it
17 needed more factual development.

18 **MR. FAIELLA:** Yes.

19 **THE COURT:** That wasn't a holding that flat out said
20 he was going to win.

21 **MR. FAIELLA:** You are correct. Yes, it was
22 actually -- it had been dismissed by the District Court and the
23 Ninth Circuit reversed that and said that there needed to be
24 more development, but that he had a claim under the ADA for
25 reasonable modification.

1 **THE COURT:** I know, but we don't know whether he was
2 going to win or not. It depended on how the facts came out.

3 **MR. FAIELLA:** And here --

4 **THE COURT:** All right. So this is not such a great
5 decision for you. It's sort of, sort of in your camp.

6 What's your next best decision?

7 **MR. FAIELLA:** Well, we would point to the *Baughman*
8 *versus Walt Disney Company* case, also from the Ninth Circuit.
9 And in that case it was individuals who were -- with
10 disabilities who wanted to use Segways instead of wheelchairs
11 at the amusement parks, and Disney's policies prohibited Segway
12 use.

13 And their claims in the Ninth Circuit were deemed valid
14 under the ADA because the Ninth Circuit stated that people with
15 disabilities -- or entities, excuse me, like the amusement park
16 here, have to consider what the experience is for people
17 without disabilities and then seek to provide a like experience
18 to people with disabilities.

19 And so in denying, you know, people with disabilities who
20 need to use Segways because of their disabilities the use of
21 those Segways, they were not allowing them full and equal
22 enjoyment of the services of the amusement park.

23 Here people with disabilities who need more time to board
24 Uber vehicles because of their disabilities are not getting
25 adequate boarding time, which is required by the Department of

1 Transportation's regulations implementing the ADA. They are
2 being denied that equal treatment, full and equal enjoyment of
3 the transportation services that Uber provides to people
4 without disabilities.

5 People without disabilities who are ready at the pickup
6 location when the car arrives and begin boarding promptly can
7 get into the car under Uber's decided two-minute wait time
8 period. But people without disabilities, like Passenger A, who
9 is described in our complaint and has quadriplegia and relied
10 on Uber twice each weekday for a year while living out of state
11 and in a different city to participate in a rehabilitation
12 program, well, she wound up paying charges to Uber, many, many
13 charges over the course of that year because she needed more
14 time to board the vehicle.

15 So she was actually charged higher fares and fees than
16 individuals without disabilities who would have been getting
17 into the car when the car arrived the way she was.

18 **THE COURT:** Well, out of 100 -- help me understand.
19 How of 100 disabled wheelchair-bound persons, how many times
20 has it occurred that they need more than two minutes?

21 **MR. FAIELLA:** Your Honor, I'm not sure the answer to
22 that question. I don't know -- in terms of Uber's ridership,
23 we just don't have facts at this point to know how many of
24 Uber's users have disabilities, whether they are mobility
25 disabilities or other types of disabilities, that would require

1 them to need more time to board.

2 We do know and we describe in our Complaint about somebody
3 like Passenger A with quadriplegia or --

4 **THE COURT:** Yeah, I read that. But that's just one
5 person. I think they were in Kentucky.

6 **MR. FAIELLA:** Uh-huh. Yeah.

7 **THE COURT:** So that's one. And out of the entire
8 United States you found an excellent example.

9 But what if that's the only example? Let's say A and B
10 are the only two. How frequently does this problem come up?

11 **MR. FAIELLA:** We know that it includes more than just
12 two people. We've -- you know, through, you know, very early
13 discovery, like initial disclosures, we have provided
14 additional names to the defendant, but we actually think that
15 Uber is in the best position to know how many people with
16 disabilities were charged these discriminatory fees.

17 We know that Uber has been on notice for years.
18 Passenger B put Uber on notice years ago that because of his
19 cerebral palsy, he needed more time to board an Uber vehicle
20 when it arrived. And eventually they denied him refunds for
21 his -- of his wait time fees, which are really fees for his
22 boarding time.

23 **THE COURT:** All right. Let me jump to a different
24 question.

25 From Uber's point of view, they have the problem, Uber has

1 the problem, of customers who call. Let's say, fully
2 able-bodied customers. And then they dwaddle around and they
3 are 20 minutes late or ten minutes late. Time is money and so,
4 therefore, the driver loses out.

5 So how would you solve this problem and accommodate the
6 disabled in this situation? How would you run the company?

7 **MR. FAIELLA:** Sure. Well, you know, an example that,
8 you know, would be helpful would be perhaps to let individuals
9 with disabilities state to Uber that they'll need more time for
10 their boarding, because boarding time is protected by the ADA,
11 and because they shouldn't be charged extra for it. And
12 because Uber has an obligation to reasonably modify, which is
13 an affirmative obligation, it should know that people with
14 disabilities are simply at times going to need additional time
15 to board, more than the two-minute mark that Uber set.

16 And so I would allow individuals with disabilities to let
17 me know that that is their situation and waive the fee for them
18 so they are not charged the fee. And they don't have to both
19 pay extra for the service --

20 **THE COURT:** Well, what would they say? Would they
21 say that when they arrive at the vehicle or do they say "I'm
22 disabled" at the time they call up the car on the app?

23 **MR. FAIELLA:** I mean, you know, I'm not a technology
24 person, but my understanding is that they could even do it when
25 they register with Uber; that they could identify as needing

1 more boarding time than two minutes because of their disability
2 and that they can then not be charged these fees.

3 That would -- to me, without knowing more about the
4 company's design and how it works, that would seem pretty
5 reasonable.

6 **THE COURT:** Well, what would you do in a case where
7 the wheelchair person is not actually there at the corner
8 waiting? They, themselves, are dwaddling in the restaurant,
9 and they are late and then they want to get -- they want to
10 avoid the fee all together on account of being disabled. What
11 would you do in that case?

12 **MR. FAIELLA:** I mean, there are individuals that are
13 the drivers of these cars. And so I don't understand why one
14 of the drivers couldn't note: Hey, even though this
15 individual -- you know, this individual didn't yet arrive at
16 the pickup location. It seems like that would be a reasonable
17 approach in a situation like that for the rider to -- to
18 actually, you know, keep track of who's actually at the pickup
19 location.

20 But you also described a scenario where sometimes drivers
21 are across the street and people with disabilities might take
22 even longer to get across the street. So there would certainly
23 have to be meaningful oversight of that kind of policy to
24 ensure that discrimination didn't continue.

25 Also, if I may, just go back quickly to the *Disney*

1 decision, wanted to warn against the Ninth Circuit, what the
2 Ninth Circuit called, you know, a retrograde approach where
3 there the Ninth Circuit recognized that Disney's argument was
4 that, you know, people could use wheelchairs instead of Segways
5 to get around, so why not let them just use wheelchairs and
6 deny them access to Segways. And the Ninth Circuit said:
7 Look, you know, this kind of an argument can be stretched, and
8 it can result in retrograde results, which would include
9 telling a person who uses a wheelchair: Well, you could get up
10 stairs if you dragged yourself. We don't need to install a
11 ramp.

12 And here I will say Uber's argument that because its
13 drivers are not merely pulling away from passengers with
14 disabilities as they are boarding it hasn't violated the ADA,
15 is that kind of a retrograde argument that the ADA protects
16 against.

17 **THE COURT:** Let me give the other side a chance to
18 respond.

19 **MR. SCHOENFELD:** Sure. Thanks very much, Your Honor.
20 I will try to address the point that you raised with the United
21 States in order.

22 With respect to the cases that the United States relies
23 on, *McGary* and *Baughman*, neither of them involved a regulation
24 that speaks to the conduct at issue and says: It is not a
25 violation of the statute. It's non-discriminatory, and there

1 is no obligation to waive the fee in those circumstances.

2 *McGary* involved a situation where the city denied the
3 request for a modification. Mr. McGary told them, "I need more
4 time to do this." And the city said, "No, we don't give you
5 more time."

6 As alleged in the Complaint, when the people call Uber and
7 say, "I was delayed on a particular ride on account of my
8 disability," the United States recognizes that Uber has a
9 policy of refunding that money --

10 **THE COURT:** The Complaint says that they -- they
11 would refuse to refund.

12 **MR. SCHOENFELD:** With respect to Passenger B at a
13 certain point in time they stopped refunding money. And so if
14 the litigation is about whether, you know, a particular refund
15 might be adequate or a particular process might be adequate, I
16 think that's one thing. But that's not the Government's theory
17 here. The Government's theory here is that the imposition of
18 the charge at all violates the ADA.

19 And so to distinguish both *McGary* and *Baughman*, you know,
20 this is a circumstance where regulation speaks, in our view,
21 directly to this conduct. And the challenge is, as the Ninth
22 Circuit recognized in *Harkins, Arizona versus Harkins*,
23 businesses are allowed to rely on these regulations to organize
24 themselves. And it's unfair for the United States, or any
25 party, to come in and say there is some other obligation that

1 falls on them when the regulations speak directly to it. So I
2 think that distinguishes both *McGary* and *Baughman*.

3 And in terms of the best case, I would point Your Honor to
4 Your Honor's own decision in *Szwanek versus Jack In The Box*,
5 which the Ninth Circuit affirmed, and that case was one where
6 the plaintiff alleged that a particular policy imposed a
7 different or higher burden on people with disabilities.

8 **THE COURT:** That was a close case, and the
9 distinction in my mind there was a -- the burden was on
10 pedestrians, because anybody that was in a car could go in
11 there use the -- but a pedestrian could not go in to the
12 restaurant after 10:00 o'clock or whatever it was.

13 So I -- I feel like it was two steps removed from your
14 case, where the burden is directly on the disabled person in a
15 wheelchair.

16 **MR. SCHOENFELD:** But I don't think it is on the --
17 the burden is directly on a person with a wheelchair.

18 And I think -- just to go back to *Szwanek*, I don't think
19 the Ninth Circuit relied necessarily on that distinction. They
20 acknowledged that where a fee that is neutral on its face
21 applies equally to people who are disabled and not disabled for
22 whatever reason, then it's not discriminatory.

23 But, again, I don't even think the Court gets to the
24 question of whether the fee falls differently or higher on
25 people with disabilities when you have these regulations that I

1 think speak directly to this.

2 The second point, just to go to the United States
3 argument, you know, their view is that because a separate
4 regulation requires adequate boarding time, you can't charge a
5 fee that is somehow related to the boarding time a person with
6 disabilities takes.

7 The same is true, again, of stowing a wheelchair. There
8 is a regulation that requires transportation service providers
9 to stow wheelchairs and, yet, DOT speaks directly to whether a
10 transportation service provider can charge a neutral
11 non-discriminatory fee to people with wheelchairs.

12 So, again, I think the entire premise of the Government's
13 argument that Uber violates the statute when it charges a fee
14 that somehow is associated with a service that's otherwise
15 required under the statute is defeated by that reg.

16 We cite another reg in our reply brief where the
17 Department of Transportation says: Look, if an air carrier
18 needs to make a second seat available to a person with a
19 disability, either because of their size or because the
20 conditions of their disability makes it such that they occupy
21 two seats, you can charge that person for the second seat.
22 You're not required to waive the fee associated with that fee.

23 So what I think is the logic behind these is that where
24 the transportation service provider is providing a service, a
25 costly service to a person with disabilities, and they are

1 applying that -- incurring that cost and applying that fee on
2 an equal evenhanded basis, even where it will apply to
3 particular disabled people in every single case and even where
4 they cannot access the transportation service without paying
5 that fee, DOT has said that doesn't violate the ADA. And --

6 **THE COURT:** But you don't have a case exactly on
7 point on these late fees. There is no regulation exactly on
8 point.

9 **MR. SCHOENFELD:** I concede that. I don't think the
10 Government has one either.

11 **THE COURT:** Well, then, right. So maybe we have to
12 fall back on the statutory language.

13 **MR. SCHOENFELD:** But there are certainly plenty of
14 cases, and I think *Harkins* is one, where the Ninth Circuit
15 relied on specific regulatory language and didn't go into the
16 general prohibition of the statute.

17 That was a case about whether close captioning and open
18 captioning were required in movie theaters. And the Court said
19 close captioning is required. There is no requirement for open
20 captioning and resort to the kind of general principles of the
21 ADA doesn't require us to provide open captioning as well.

22 There is the *Abercrombie* case from the Tenth Circuit that
23 we cite. There is the *Amtrak* case, which arises under these
24 same regulations, both DOT and DOJ from the Eastern District of
25 Pennsylvania. And there, too, the Court makes clear that once

1 you've complied with regulatory language, the kind of
2 overarching aims of the statute don't supplement those
3 obligations.

4 So I grant you that there is nothing speaking directly to
5 this.

6 I will say that for that -- that I think the case law on
7 surcharges, special charges and higher charges, is uniformly in
8 our favor. I grant you that none of it arises in this
9 particular context. None of it relates to wait fees.

10 But it all relates to fees that are charged for a product
11 that people with disabilities can never avoid using. Gluten
12 free food for people with celiac disease. Plus size clothing
13 for people who are obese, and their obesity qualifies as a
14 disability. Wheelchairs and the stowage fee example.

15 Again, I'm not going to sell you a false bill of goods on
16 what the case law says, but in terms of both the logic of these
17 cases, they uniformly support the view that Uber is advancing
18 here.

19 And I think to go back to *Harkins*, when you have a
20 regulation that speaks to this, a business is entitled to rely
21 on it in organizing their affairs and knowing that DOT has
22 looked in the special context, transportation service
23 providers, and concluded that imposing a fee equally to people
24 with disabilities and people without disabilities, even where a
25 person with disabilities will never be able to avoid incurring

1 that charge, it doesn't violate the statute.

2 **THE COURT:** Okay. I will give you a very brief
3 response, please.

4 **MR. FAIELLA:** Thank you, Your Honor.

5 I'd like to respond just to a few points there. First of
6 all, here Uber is trying to use a narrow exception articulated
7 in the regulatory appendix to swallow the rule. The full and
8 equal enjoyment mandate of the statute, the ADA, is what should
9 control here and lead the analysis.

10 The Department of Transportation was entrusted to protect
11 certain aspects of the transportation experience for people
12 with disabilities. In doing so they protected adequate
13 boarding time. The same way they protected accompaniment by a
14 service animal.

15 And if you read the appendix that Uber cited about
16 37.5(d), that appendix -- first of all, the regulation itself
17 calls on not charging for required services or reasonable
18 modifications.

19 And also the appendix notes that an entity can't charge
20 for accompaniment by a service animal. And a service animal is
21 another requirement, another service requirement listed under
22 Section 37.167 of the DOT regs. Section 37.167(i) is where you
23 find adequate boarding timing required.

24 So when you read that section and you read the appendix,
25 you actually -- that's a way to read it consistent with the

1 ADA, as opposed to Uber trying to use a stowage fee example to
2 swallow a rule here.

3 You can't charge a person who needs a service animal the
4 same way you can't charge a person who needs adequate boarding
5 time. Doing so would -- would be leading to the retrograde
6 results that are guarded against in the Ninth Circuit's
7 *Baughman* decision. So I just wanted to state that first.

8 I also wanted to note that the Air Carrier Access Act
9 regulation that Uber has cited, I think it's incompletely
10 cited. The regulations work as a whole under the Air Carrier
11 Access Act to prohibit charges for required services. And one
12 of the required services under that Act includes time for
13 preboarding for people who self-identify as having a
14 disability-based need to preboard. And so that's actually a
15 principle that is consistent with the United States claim.

16 The Air Carrier Access Act provision that they cite about
17 charging for an extra seat is not applicable and, once again,
18 shows their gimmicky approach in trying to use an exception to
19 swallow the rule.

20 **THE COURT:** All right. Have a seat. Thank you.

21 All right. I'm going to rule from the bench and deny the
22 motion. I have a few comments to make. It's kind of like that
23 Oregon case. We need -- and I feel I need a lot more facts to
24 be -- to be able to tell whether or not this falls -- which
25 side this falls on.

1 It's true that we have a regulation that says an entity
2 shall not impose special charges on individuals with
3 disabilities, but we're not dealing with that. We're not
4 dealing with a special charge. And the fact that there is a
5 regulation that says you cannot do something, that a special
6 charge is illegal, does not automatically legalize everything
7 else.

8 And so the statute still has the requirement that if the
9 modification is discrimination, where the modification is
10 necessary to afford such goods, services, facilities and so
11 forth to individuals with disabilities, unless the entity can
12 demonstrate that making such modifications would fundamentally
13 alter the nature of such goods, services and so forth. So
14 the -- the issue under the statute is what modification would
15 accommodate those who are disabled and would those
16 accommodations be fundamentally alter the nature of the goods
17 and services.

18 Now, you all may understand the fact patterns better than
19 me, but the pleading is bare bones and the Complaint -- I'm
20 sorry, the motion goes outside the pleadings. And I still
21 don't know how this actually works in practice.

22 Let me give you a practical example. The refund policy.
23 Does Uber -- let's say somebody gets in a cab. They are
24 disabled and it takes them three minutes. So they get hit with
25 a fee. All right. Do they get hit with a fee automatically?

1 Or does the driver have discretion to say: Okay, I'll waive it
2 because you're not -- you're in a wheelchair. Or what if the
3 passenger says: I'm in a wheelchair. I need add few extra
4 minutes and I don't want to get hit with an extra fee. Please
5 refund that.

6 What happens in that situation? What is the practice,
7 actual practice on the ground, and you've got to get into the
8 records of the company. Get into the records of the company.
9 Take depositions -- just a second.

10 (Discussion held off the record between the Court and
11 the Law Clerk.)

12 **THE COURT:** My Law Clerk tells me that the Complaint
13 says that the drivers don't have discretion. Maybe that's not
14 true. It won't be the first time that the Government has
15 alleged something that turns out to be untrue. I don't know.
16 The depositions will tell us what's true.

17 And here is another thing I've learned in these cases.
18 The Government is afraid to take depositions. The Government
19 won't take depositions until every single document in the
20 universe is produced. Don't do that to me. You get in there
21 and start taking depositions even before you get all the
22 documents, because we're going to have a fast trial in this
23 case. It's going to be this year. Not fast, it will be
24 reasonable.

25 Now, I got interrupted. I've forgotten where I was.

1 I think what I was saying is I want to understand in
2 practice on the ground how the refund policies actually work in
3 practice. So if every single disabled person has always gotten
4 their money back, then there is no complaint, I think.

5 However, I doubt that that's true. But how -- how close
6 to being true is it? We don't know. We should find out.

7 Another thing is how does this fee work? Let's say how
8 often does it occur that they park across the street on a busy
9 street and it takes four minutes before the light even changes
10 so they can get over there. And how accurate are these GPS
11 things anyway? It doesn't -- it starts with when the GPS tells
12 them.

13 Well, have you ever figured out that the GPS -- sometimes
14 doesn't Waze tell you that you're in a certain location when
15 you're not? How accurate is that GPS thing? Well, I'd like to
16 know that, too.

17 The -- the ultimate -- and then there is a question of on
18 its face it's a neutral policy, but what is the actual burden
19 on the disabled? Is it just a rare case, or does it come up
20 all the time? Does it really -- is it really the case that the
21 burden of this policy is dramatically more on the disabled than
22 it is on -- now, if this was a late fee that started after ten
23 minutes, then I would probably say: Look, this -- everybody,
24 even the disabled, can get into the car in ten minutes. But if
25 it's two minutes, I don't know. That's a lot closer call. And

1 how much time does somebody in a wheelchair need?

2 Well, I can guarantee you that if it's across the street
3 on a busy street, it's going to be more than two minutes. But
4 how often does that occur? Well, I don't know. I don't know.

5 That's where it -- depositions. That's where records.
6 That's where getting in there and actually doing the hard work,
7 that's where you've got to get going on this and do not delay.
8 If you delay, I'm not going to -- please don't. Please don't
9 do what the Government does in other cases, which is: I insist
10 on every document in the universe before you take the first
11 deposition.

12 They get to take depositions, too. You get to go to
13 Kentucky, take the deposition of that person in Kentucky.

14 All right. I think Uber has made some good points on
15 these regulations. I'm not sustaining their entire theory, but
16 there are some regulations that tend to show that a neutral
17 policy is okay.

18 So the Government is going to get a chance to make its
19 case and show undue burden, if that's the test, but I've
20 forgotten what the test is. I think it's undue burden.
21 Disproportionate burden.

22 Okay. Now we're going to turn to -- just tell me, I'm
23 going to treat this as a case management conference. Discovery
24 starts effective today. Give me the date you want for a trial
25 date that will be this year.

1 What does the Government want? Otherwise I'll pick it for
2 you.

3 **MR. FAIELLA:** Your Honor, I haven't consulted with
4 everybody --

5 **THE COURT:** Well, too bad. This is the time. You
6 consult with me. What -- what does your schedule permit?

7 **MR. FAIELLA:** I'm thinking about briefing in a couple
8 of other matters. Would sometime in November be --

9 **THE COURT:** Yes, that would be good. How about
10 November 7th. November 7th?

11 November 7th. Hearing no objections, that's going to be
12 our trial date.

13 **MR. SCHOENFELD:** Your Honor, I apologize, but my
14 client says he has another trial on November 7th.

15 **THE COURT:** All right. Well, then, let's go with
16 November 14th. I'm happy to give you Thanksgiving week.
17 Thanksgiving week would be a good week. Let's go with that.

18 **MR. SCHOENFELD:** Sorry. I apologize. His trial is
19 the week of November 22nd. So --

20 **THE COURT:** All right. So we'll stick with
21 November 7th, all right. All right. So I'll get out a case
22 management order.

23 Are there any other case management issues that you see
24 coming down the pike?

25 **MR. FAIELLA:** We have been working with Uber's

1 counsel to engage in mediation. At this point we are aiming to
2 schedule something for, I believe, May 12th or 13th.

3 **THE COURT:** May 12th -- all right. Do you have a
4 mediator picked out?

5 **MR. FAIELLA:** Yes, we do.

6 **THE COURT:** Who is that?

7 **MR. FAIELLA:** It's Judge Laporte. L-A-P-O-R-T-E.

8 **THE COURT:** Laporte in May. Okay. That's fine.

9 This is not a class action. So this is -- I'll let do you
10 that. It's the Government. You're not going to do an illusive
11 deal.

12 **MR. SCHOENFELD:** Your Honor?

13 **THE COURT:** Yes.

14 **MR. SCHOENFELD:** The case is referred to the ADR
15 program to Judge Vadas, and the parties then spoke and are
16 planning to work with Judge Laporte.

17 Do you want us to file a stipulation formally relieve
18 Judge Vadas?

19 **THE COURT:** Yeah, you better do that, but I also will
20 try to get that rolled into my case management order.

21 **MR. SCHOENFELD:** Okay. The order referring to Judge
22 Vadas is on the docket, and we were going to file a
23 stipulation. So we're happy to do it however Your Honor
24 prefers.

25 **THE COURT:** Wait and see if I can get it rolled into

1 my case management order before you go to all that trouble.

2 **MR. SCHOENFELD:** Sure. And we have let Judge Vadas
3 know that we're planning on working with Judge Laporte.

4 **THE COURT:** Okay. That would be great. But don't
5 you need to take some discovery and get in there before you do
6 any mediating? Look at records.

7 **MR. FAIELLA:** Yes, Your Honor. Under General Order
8 56 of the Northern District of California, we did have some
9 preliminary settlement discussions with Uber, and through those
10 discussions got a little bit of insight into some of its
11 practices. And we are hoping that through mediation we can
12 gain proper insight in the interest of figuring out a remedy
13 here that will work.

14 **THE COURT:** Okay. I hope that works. But, listen.
15 One thing you cannot do to me is come back to me in June and
16 say: Oh, Judge, we know we were supposed to be taking those
17 depositions, but we didn't because we told you all about
18 judge -- you should be doing them all simultaneously. Two
19 tracks. Huckley buck. Go down the huckley buck track of
20 discovery and of mediation. That way you will be ready for
21 trial and you won't be asking for continuances of the trial
22 when November comes.

23 Okay. I think I've done all the damage I can do for one
24 day. So motion denied. Without prejudice to a number of good
25 points they have made. But I want to have a more developed

1 record on how this system actually works before I say that it's
2 okay or not.

3 Okay? Thank you. Have a good day.

4 (Proceedings adjourned.)
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CERTIFICATE OF OFFICIAL REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Debra L. Pas

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Friday, April 15, 2022